Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1974

No. 75-26

Fred Carroll Lucas and
Ronnie Ray Lucas ..... *Appellants*

V.

State of Arkansas ..... *Appellee*

ON APPEAL FROM THE
SUPREME COURT OF ARKANSAS

[redacted]S

JURISDICTIONAL STATEMENT

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No. _____

Fred Carroll Lucas and
Ronnie Ray Lucas ..... *Appellants*

V.

State of Arkansas ..... *Appellee*

ON APPEAL FROM THE
SUPREME COURT OF ARKANSAS

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 257 Ark. _____, 520 S. W. 2d _____. It is reproduced in Appendix "A" to this appeal.

JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered on March 3, 1975. That Court entered its final judgment upon denying rehearing April 7, 1975, a copy which is printed in Appendix "B". The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. 1527(2).

QUESTION PRESENTED

Whether a State statute proscribing the use of any profane, violent, vulgar, abusive or insulting language toward or about any other person in his presence or hearing, which language in its common acception is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or an assault is unconstitutional for vagueness and overbreadth.

STATUTE INVOLVED

Section 41-1412 (Repl. 1964) of the Arkansas Statutes Annotated provided as of the dates involved in this case:

> 41-1412. Profane or abusive language as breach of the peace - Penalty. - If any person shall make use of any profane, violent, vulgar, abusive or insulting language toward or about any other person in his presence or hearing, which language in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or assault, shall be deemed guilty of a breach of the peace, and upon conviction thereof shall be punished by a fine of not less than five ($5.00) nor more than two hundred

> dollars ($200) or by imprisonment in the county jail for not less than one (1) nor more than six (6) months, and any person who shall be punished by fine only under the provisions of this act (§§41-1412 — 41-1414) and shall not pay said fine, or secure the payment thereof, to the satisfaction of the court before such person is released from custody, it shall be the duty of the officer having such person in custody to confine him in the county jail until such fine is paid at the rate of one dollar ($1.00) per day. (Act Feb. 19, 1909, No. 30, §1, p. 73: C&M Dig., §2774, Pope's Dig., 3479.)

STATEMENT OF THE CASE

The appellants were convicted of using Abusive Language under a State statute which appellants contend is so vague and overbroad as to violate their freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States. The appellants raised the constitutionality of the State statute in the trial court and in the Supreme Court of Arkansas, and was discussed in that Court's opinion affirming appellants conviction in Appendix "A".

On April 15, 1974, the Supreme Court of the United States, 416 U.S. 919 (1974) granted certiorari, vacated the state court judgment and remanded the case for further consideration in light of *Lewis v. City of New Orleans*, 415 U.S. 130 (1974).

On March 3, 1975, the Supreme Court of Arkansas, in a split decision (four-three), the majority quoted from the minority opinion of *Lewis v. City of New Orleans*, supra, and affirmed the judgment of the trial court.

On the last page of the opinion of the Arkansas Supreme Court (Appendix "A") Justice Jones sets forth as basis of their decision:

> "x x xWe adhere to our former opinion that Ark. Stat. Ann. §41-1412 (Repl. 1964) should be measured by the reasonable and common sense rules announced in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
>
> We conclude, therefore, that Ark. Stat. Ann. §41-1412 (Repl. 1964) is constitutional in light of *Lewis v. City of New Orleans*, supra, and that the judgment of the trial court in this case should be reaffirmed."

THE QUESTIONS ARE SUBSTANTIAL

The statute, by its terms, does not make the crime one of intent, and the vagueness of the terms eliminate any possibility of scienter.

Terminiello v. City of Chicago, 337 U.S. 1 (1949). There is simply no way for the speaker to know when his speech has gone beyond the protected pole and becomes "abusive" in the sense that it will subject him to possible penalties.

The statute is vague because the standard of conduct which it specifies is uncertain; "men of common intelligence must necessarily guess at its meaning." *Connally v. General Construction, Co.*, 269 U.S. 385. The "void for vagueness" doctrine is, of course, a due process concept implementing principles of fair warning and nondiscriminatory enforcement. Vague laws may trap those who desire to be law-abiding by not providing fair notice of what is prohibited. *Papachristou v. City of*

Jacksonville, 405 U.S. 156 (1972); *U. S. v. Harris*, 347 U.S. 612 (1954). The statute also provides opportunity for arbitrary and discriminatory enforcement since those who apply the laws have no clear and explicit standards to guide them. *Coates v. Cincinnati*, 402 U.S. 611 (1971).

In *Gooding v. Wilson*, 405 U.S. 518 (1972), this Court affirmed a United States District Court's decision to set aside a conviction under a Georgia statute which is similar to the statute involved here on the ground that the statute, on its face, was unconstitutionally vague and broad.

This Court has held that before it declares a statute as facially unconstitutional, the state courts should have the opportunity to construe the statute, if possible, within the constitutional pronouncements. The decisions of this Court are to guide state courts in the exercise of this duty.

The Supreme Court of Arkansas held that they would adhere to their former opinion, thereby failing to reconsider its former opinion in *Lewis v. City of New Orleans*, supra, as directed by this Court. Nothing can be gained by further state court reconsideration in light of *Lewis*.

CONCLUSION

For the foregoing reasons, the Appellants submit that the decision of the court below was in error in holding that Section 41-1412 (Repl. 1964) of the Arkansas Statutes Annotated was constitutional and that this Court should reverse said decision and dismiss the conviction of the Appellants.

Respectfully submitted,

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APPENDIX "A"

SUPREME COURT OF ARKANSAS
No. CR-73-31

Fred Carroll Lucas and Ronnie Ray Lucas,	Opinion Delivered Mar 3 1975
V. Appellants	Appeal from Pulaski Circuit Court, Fourth Division
State of Arkansas,	Richard B. Adkisson, Judge
Appellee	AFFIRMED

J. FRED JONES, Associate Justice

We have reconsidered this case in the light of *Lewis v. City of New Orleans*, 415 U.S. 130 (1974), as directed by mandate of the United States Supreme Court in its one sentence decision of April 15, 1974. The dissenting opinion of Mr. Justice Blackmun, in which the Chief Justice and Mr. Justice Rhenquist joined, sets out the facts in more detail than we did in our original opinion, *Lucas v. State*, 254 Ark. 584, 494 S. W. 2d 705. The facts are not germane to the issue now before us and they will not be recited again here.

The statute under which the appellants were convicted, Ark. Stat. Ann. §41-1412 (Repl. 1964), was Act 30 of the Arkansas Legislature for 1909. It was entitled "An Act to Better Protect the Public Peace," and it has served its purpose for more than 50 years without question as to its constitutionality until now.

We find no comparison between Ark. Stat. Ann.

§41-1412 (Repl. 1964) and the New Orleans Municipal Ordinance 828 M.C.S. §49-7 struck down as unconstitutional in *Lewis v. City of New Orleans, supra.* The New Orleans Ordinance provided as follows:

> "It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty."

Aside from the ambiguity in the word "opprobrious," as pointed out in *Lewis*, the New Orleans Ordinance would have made it unlawful and a breach of the peace to curse, revile or use obscene language *toward* or with *reference to* any member of the city police while in the actual performance of his duty regardless of when, where, or to whom the language was used or addressed. Furthermore, the New Orleans Ordinance provided a one sided violation. It was apparently designed to protect the police force against unguarded and over-emphatically expressed criticism of its members in the performance of their duty regardless of when, or where, or to whom the language was addressed, and regardless of whether the language arose from incitement, anger or frustration. In other words, the New Orleans Ordinance protected members of the police force from the use of the described language toward, or with reference to them, but did not protect the public from the same language used by any member of the city police while in the performance of their duty even when addressed directly to a member of the public who might be involved. Such is not the wording effect or intent of Ark. Stat. Ann. §41-1412 (Repl. 1964). Mr. Justice Powell concurring in the result reached in *Lewis v. City of New Orleans, supra,* clearly sets out the constitutional deficiencies in the New Orleans Ordinance, but we are of

the opinion its deficiencies do not apply to Ark. Stat. Ann. §41-1412 (Repl. 1964) as interpreted and applied by the courts of this state.

Under Ark. Stat. Ann. §41-1412 (Repl. 1964) the language must be *profane, violent, vulgar* or *abusive* and must be directed toward or about any other person *in his presence or hearing.* Such language must *in its common acceptation be calculated to arouse to anger* the person about or to whom it is spoken or addressed, *or to cause a breach of the peace or assault.* When a police officer is involved, this statute applies to language used *by* a police officer, as well as to the language used *to* a police officer. It is a matter of common knowledge that many assaults, both simple and aggravated, and also many homicides, have their origin in profane, violent, vulgar, abusive or insulting language addressed to or about another person in his presence or hearing. It is also common knowledge that such language used by members of the police, when addressed to a member of the public, results in resisting arrest and more important, results in a loss of respect for law and order.

In our original opinion, *Lucas v. State, supra,* we attempted to distinguish Ark. Stat. Ann. §41-1412 (Repl. 1964) from the Georgia statute, §26-6303, struck down in *Gooding v. Wilson,* 405 U.S. 518 (1972). We are still of the opinion that "opprobrious words or abusive language tending to cause a breach of the peace," as was used in the Georgia statute, is much broader than the "profane, violent, vulgar, abusive or insulting language. . . which language in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or an assault," as used in the Arkansas statute, § 41-1412, *supra.* Unlike

the standard fixed by the jury in applying the Georgia statute as was exemplified in the case of *Fish v. State*, 52 S. E. 737, where the Georgia Supreme Court held that a jury question was presented under the statute by the language: "You swore a lie," as pointed out in *Gooding, supra*, this court (Arkansas Supreme Court) narrowed the language of the Arkansas statute as early as 1918 in the case of *Holmes v. State*, 135 Ark. 187, 204 S. W. 846. In *Holmes* the prosecuting witness, Hatch, was very much offended at the conduct of some boys in the community frequently calling him by the nickname "Taters" and other similar nicknames. In that case the trial court, among other instructions, gave one of the jury submitting to them for determination the question of whether or not the language used was such as in its common acceptation was calculated to arouse a person to anger and cause a breach of the peace. In reversing the judgment of the trial court and dismissing the charges, this court said:

"Counsel for appellant insist that the instruction should not have been given and that the evidence was not sufficient to warrant a conviction, in that the language used by the boys does not come within the statute. It will be observed that the statute defines the character of language constituting the offense as 'profane, violent, abusive or insulting language * * * which language in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace,' etc. The language used must be in its nature 'profane, violent, abusive or insulting' and it must be of that character which 'in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or an assault.' It is not sufficient that the language used gives offense to the person to whom or about whom

it is addressed, but it must be that which in its ordinary acceptation is calculated to give offense and to arouse to anger.

In *State v. Moser*, 33 Ark. 140, the defendant was accused of directing toward another person the language 'go to hell, God damn you,' and in passing upon the question of the guilt of the defendant, this court said that the language used was certainly profane, but that it was a question for the jury to determine whether the words were used under such circumstances as was calculated to arouse to anger the person to whom the words were addressed. In the present case the word used towards Hatch was neither profane, violent, abusive nor insulting, and was not in its common acceptation calculated to arouse a person to anger. The fact that Hatch became offended at the application to him of the nickname does not make the language such as is insulting according to its common acceptation. ***It did not carry the implication of unlawful conduct or moral turpitude on the part of the person toward whom it was used. It was undoubtedly offensive to him and he showed his irritation repeatedly, but the statute was not intended to reach cases where persons by the use of harmless nicknames or in a spirit of fun make use of nicknames or expressions which, although they are not calculated in their common acceptation to arouse anger, do in fact give offense because of the peculiar sensibilities of the person to whom or about whom the words are used. It may be considered bad taste for men or boys to indulge in such practice, but the law was not intended to reach such cases. We know that even innocent amusement at the expense of others sometimes brings about a breach of the peace, but those are not the things which the law meant to reach by this statute. It is only the language of the kind referred to which is calculated in its ordinary acceptation to arouse to anger or cause a breach of the peace that the statute denounces.

> Our conclusion is, therefore, that the testimony in the case, given its strongest force, does not establish an offense under the statute. The judgment of the circuit court is reversed and the charge against each of the defendants is dismissed."

Thus it is seen, and we so hold, as was indicated in *State v. Moser, supra,* that before a person may be properly charged with an offense under the statute, the profane, violent, vulgar or abusive language alleged to have been employed must be such as in its common acceptation is calculated to arouse to anger, etc. and the only question for determination by the jury is whether the accused employed such language, and whether it was calculated to arouse to anger, etc. Surely no one would suggest that in order to pass constitutional muster in sustaining the convictions in the case at bar, it would be necessary for the statute to set out the exact language employed by the appellants in this case. We adhere to our former opinion that Ark. Stat. Ann. §41-1412 (Repl. 1964) should be measured by the reasonable and common sense rules announced in *Chaplinsky v. New Hampshire*, 315 U.S. 568.

We conclude, therefore, that Ark. Stat. Ann. §41-1412 (Repl. 1964) is constitutional in the light of *Lewis v. City of New Orleans, supra,* and that the judgment of the trial court in this case should be reaffirmed.

The judgment is affirmed.

George Rose Smith, Brown and Byrd, JJ., dissent.

APPENDIX "B"

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS, In the Supreme Court } SCT.

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 7th day, being the first Monday of October, A. D. 19 74, amongst others were the following proceedings, to-wit:

On the 7th day of April, A. D. 19 75, a day of said term

Fred Carroll Lucas & Ronnie Ray Lucas — APPELLANT S

vs.

State of Arkansas — APPELLEE

Appeal from Pulaski Circuit Court Fourth Div. District

No. CR73-31

Rehearing denied.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 24th day of June, A. D. 1975.

JIMMY H. HAWKINS
Clerk

By /s/ Robin Horne
D. C.

APPENDIX "C"

SUPREME COURT OF ARKANSAS

FRED CARROLL LUCAS AND
RONNIE RAY LUCAS — APPELLANTS

VS. — CRIMINAL NO. 73-31

STATE OF ARKANSAS — APPELLEE

NOTICE OF APPEAL

Comes the Appellants, and hereby serves a Notice of Appeal of the decision of the Arkansas Supreme Court of

March 3, 1975, and the denial of the Petition for Rehearing rendered April 7, 1975, to the Supreme Court of the United States.

FRED A. NEWTH, JR.
Union Life Building
Little Rock, Arkansas 72201

Attorney for Appellants

CERTIFICATE OF SERVICE

I, Fred A. Newth, Jr., Attorney for the Appellants, certify that I have served the Attorney General of the State of Arkansas, Attorney for Appellee, with a copy of the foregoing Notice of Appeal, by depositing the same in the United States mail with proper postage thereon.

/s/Fred A. Newth, Jr.
FRED A. NEWTH, JR.